

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

GEORGINA E. LOCHRIE

Claimant

V.

STEVENS COUNTY HOSPITAL

Respondent

AND

KANSAS WORKERS RISK COOP FOR COUNTIES

Insurance Carrier

Docket No. 1,071,785

ORDER

Claimant requests review of the January 6, 2014, preliminary hearing Order entered by Administrative Law Judge Pamela J. Fuller. Claimant appears by counsel, Lawrence M. Gurney. Respondent and insurance carrier (respondent) appear by counsel, Jeffrey R. Brewer.

ISSUES

At the preliminary hearing, claimant alleged she sustained left shoulder and neck injuries as the result of a fall at work on September 1, 2014. The Administrative Law Judge (ALJ) found claimant gave notice of her accident and it was witnessed, but she failed to give notice of an injury within 20 days. The ALJ denied claimant's request for medical treatment and temporary total disability.

Claimant argues the ALJ erred by making a distinction between "accident" and "injury" where there is no such distinction. Claimant asserts that because she made an incorrect self-assessment of the cause of her pain does not mean her supervisor failed to recognize both an accident and injury. Claimant's decision not to complete the incident report did not divest the supervisor of the knowledge an accident and injury had occurred and, therefore, respondent had actual knowledge of claimant's injury pursuant to K.S.A. 2013 Supp. 44-520(b)(1), and the Board should reverse the ALJ's order.

Respondent argues the workers compensation statutes provide two separate definitions of accident and injury in K.S.A. 44-508(d) and K.S.A. 44-508(f)(1). It cannot be presumed every accident results in injury, and with claimant denying a new injury with no visible evidence of injuries at the time of claimant's accident, claimant's supervisor had no actual knowledge of an injury and the Board should affirm the ALJ's denial of benefits.

The issues raised for the Board's consideration are:

1. Did claimant provide timely notice of her injury by accident?
2. Did respondent have actual knowledge of the injury?

FINDINGS OF FACT

Having reviewed the entire record, the stipulations of the parties, and having considered the parties' briefs, the Board makes the following findings:

Claimant testified that on September 1, 2014, between 9:00 and 10:00 a.m., one of the residents slid out of her wheelchair. Claimant moved to go behind the wheelchair to pull up the resident and claimant stepped on the wheelchair instead of the floor. The wheels of the wheelchair moved and claimant fell on the floor on her left shoulder and knee. Claimant was on the floor for about five minutes, embarrassed and hurt.

The charge nurse, Marie Melton, and Rochelle, a CNA, were with claimant when she fell. Claimant testified she was supposed to report work accidents to Ms. Melton. According to claimant, Ms. Melton told her to fill out an incident report, but claimant said "it's probably the same pain I've been feeling, you know."¹ Claimant did not think she had sustained a new injury, so she did not fill out an incident report. Claimant's pain continued to worsen, but she continued doing her regular job for over a month.

Claimant admitted knowing there was a requirement for her to report a work injury within a certain period of time and there was no reason why she did not report to respondent she was having different problems than before. Claimant had three pending workers compensation claims and indicated she knew she must tell respondent she had an accident, what part of her body was injured and how it happened.

According to claimant, she did not ask for treatment at the time of the accident because she had back and shoulder pain from an earlier injury. Claimant thought her pain was from the earlier injury until she experienced different pain that went up into her neck. Claimant did not fill out an incident report, talk to her supervisor about the different pain and did not tell her supervisor she was going to see a doctor.

Claimant's pain grew worse so she saw Samer Al-Hashmi, M.D. in Hugoton. On October 2, 2014, Dr. Al-Hashmi took claimant off work, prescribed pain medication and physical therapy.

After her appointment with Dr. Al-Hashmi, claimant tried to see the director of nursing, Jennifer, but she was not in. On October 3, 2014, claimant reported to Jennifer the date of the September 1, 2014, injury, how it happened, areas of the body injured and about her visit to Dr. Al-Hashmi. Claimant also told Jennifer that Ms. Melton had observed the fall. Jennifer

¹ PH. Trans. at 7.

told claimant that she should have filled out an incident report and they would talk again once claimant was released to return to work.

Claimant testified after she was released to work, respondent did not put her back to work. They told her she was a liability and asked her to resign, but claimant did not do so. Respondent sent her to Dr. Al-Hashmi on November 5, 2014, for a functional evaluation. Claimant testified Dr. Al-Hashmi could not evaluate her because she had other injuries. According to claimant, the doctor was upset because Diane, respondent's human resources worker, was in the room with them.

Claimant indicated respondent denied her claim because she allegedly did not give notice until 31 days after the accident. Claimant has not worked since she was taken off work as a result of her accident.

As the result of another claim or claims, claimant is being treated for the previous left shoulder injury and a low back injury. She is waiting to see Dr. Prohaska for her left shoulder and also had low back surgery. Claimant testified her difficulties from her current injuries are different from her previous injuries because she now has neck and middle spine pain with headaches.

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.² "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act."³

K.S.A. 2013 Supp. 44-508, in part, states:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

...

(f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

² K.S.A. 2012 Supp. 44-501b(c).

³ K.S.A. 2012 Supp. 44-508(h).

K.S.A. 2013 Supp. 44-520, in part, states:

(a)(1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:

(A) 20 calendar days from the date of accident or the date of injury by repetitive trauma;

(B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or

(C) if the employee no longer works for the employer against whom benefits are being sought, 10 calendar days after the employee's last day of actual work for the employer.

Notice may be given orally or in writing.

(2) Where notice is provided orally, if the employer has designated an individual or department to whom notice must be given and such designation has been communicated in writing to the employee, notice to any other individual or department shall be insufficient under this section. If the employer has not designated an individual or department to whom notice must be given, notice must be provided to a supervisor or manager.

(3) Where notice is provided in writing, notice must be sent to a supervisor or manager at the employee's principal location of employment. The burden shall be on the employee to prove that such notice was actually received by the employer.

(4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.

(b) The notice required by subsection (a) shall be waived if the employee proves that:

(1) The employer or the employer's duly authorized agent had actual knowledge of the injury; (2) the employer or the employer's duly authorized agent was unavailable to receive such notice within the applicable period as provided in paragraph (1) of subsection (a); or (3) the employee was physically unable to give such notice.

At the time of claimant's fall, Ms. Melton recommended an incident report be completed. Claimant indicated her pain was probably the same pain she was feeling from a previous condition and not a new and distinct injury. That is notice of an injury. An injured worker, under K.S.A. 2013 Supp. 44-520(a), is required to provide timely notice of his or her "injury by accident or repetitive trauma." The fact that claimant thought her injury was from a previous condition does not negate the fact that claimant provided respondent notice of her injury by accident.

Moreover, claimant's supervisor, Ms. Melton, was present when claimant fell. Ms. Melton observed claimant on the ground and in pain. Thus, Ms. Melton had actual knowledge of claimant's accident. Ms. Melton's recommendation that claimant complete an incident report infers Ms. Melton thought claimant sustained an injury. Claimant's expressed uncertainty that her fall did not cause her pain does not cancel respondent's actual knowledge of her injury.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁴ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Pamela J. Fuller dated January 6, 2014, is reversed and remanded for further proceedings to address other issues raised by the parties.

IT IS SO ORDERED.

Dated this _____ day of April, 2015.

HONORABLE THOMAS D. ARNHOLD
BOARD MEMBER

c: Lawrence M. Gurney, Attorney for Claimant
fdesk@ksworkcomplaw.com
larry@ksworkcomplaw.com

Jeffrey R. Brewer, Attorney for Respondent and its Insurance Carrier
jlyons@jbrewerlegal.com
jbrewer@jbrewerlegal.com
mbutterfield@jbrewerlegal.com

Honorable Pamela J. Fuller, Administrative Law Judge

⁴ K.S.A. 44-534a.